

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :  
CR-03-929

-against- : United States Courthouse  
Brooklyn, New York

JOSEPH MASSINO,  
PATRICK DeFILIPPO,  
EMANUEL GUARAGNA,  
JOHN SPIRITO,  
ANTHONY FRASCONE,  
ANTHONY SIANO,  
RUSSELL TRUCCO,

Defendants. : April 2, 2004  
2:00 o'clock p.m.

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TRANSCRIPT OF STATUS CONFERENCE  
BEFORE THE HONORABLE NICHOLAS G. GARAUFIS  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: ROSLYNN R. MAUSKOPF  
United States Attorney  
BY: GREG ANDRES, MITRA HORMOZI,  
NICK BOURTIN, and ROBERT HENOCK  
Assistant United States Attorneys  
225 Cadman Plaza East  
Brooklyn, New York 11201

For the Defendant: DAVID BREITBART, ESQ.  
GLORIA EDWARDS, ESQ.  
For J. Massino

RICHARD LEVITT, ESQ.  
JEAN BARRETT, ESQ.  
For P. DeFilippo

MURRAY RICHMOND, ESQ.  
For J. Spirito

MICHAEL BACHRACH, ESQ.  
For A. Frascone

1 HAROLD FAHRINGER, ESQ.  
2 For A. Siano

3 JOHN IANNUZZI, ESQ.  
4 For R. Trucco

5 Court Reporter: Henry R. Shapiro  
6 225 Cadman Plaza East  
7 Brooklyn, New York  
8 718-260-2509

9 Proceedings recorded by mechanical stenography, transcript  
10 produced by CAT.

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13  
14 THE CLERK: United States versus Massino, et al.

15 THE COURT: This is 03-CR-929.

16 MR. ANDRES: Greg Andres, Nick Bourtin, Mitra  
17 Hormozi, and Robert Henoch.

18 MS. EDWARDS: For Mr. Massino, Gloria Edwards and  
19 David Breitbart, your Honor.

20 THE COURT: Good afternoon. Mr. Stern is not here.

21 MR. BREITBART: He is on one of those litigation  
22 trips to Egypt.

23 THE COURT: Patrick DeFilippo. Good afternoon.

24 MR. LEVITT: Richard Levitt for Mr. DeFilippo, along  
25 with Jean Barrett Lloyd Epstein.

1 I suggest where the government maybe seeking to execute my  
 2 client, it is not unreasonable to interpret a reasonable time  
 3 before trial to mean now.

4 THE COURT: Anything else?

5 MR. ANDRES: No, Judge.

6 MR. BOURTIN: No.

7 THE COURT: We also have a motion -- I have a motion  
 8 to quash. I think we're going to handle that in camera.

9 MR. BOURTIN: Yes, sir.

10 THE COURT: I have considered the arguments here and  
 11 the papers submitted with respect to Mrs. DeFilippo's motion  
 12 for discovery relevant to the death penalty determination and  
 13 I'm denying it for the following reasons:

14 Mr. DeFilippo, argues that the opportunity to  
 15 provide mitigating evidence to the Department of Justice for  
 16 its consideration in determining whether to seek the death  
 17 penalty creates expanded discovery rights and I do not agree.

18 The Department of Justice, U.S. Attorney's Manual,  
 19 which I will call "the manual", is an internal document for  
 20 use only in directing procedure, and does not create any

21 rights enforceable by law. Such rights include those relating  
 22 to discovery. Specifically, "the manual" states that it:

23 "Provides only Department of Justice Guidance. It  
 24 is not intended to, does not, and may not be relied upon to  
 25 create any rights substantive or procedural, enforceable at

1 law by any party in any matter civil or criminal."  
 2 In "the manual" the Department of Justice does offer  
 3 defense Counsel, "a reasonable opportunity to present any  
 4 facts, including any mitigating factors to the United States  
 5 Attorney for consideration." This, however, does not alter the  
 6 fact that no right to discovery is created by "the manual".  
 7 Thus Mr. DeFilippo's argument for expanded discovery rights  
 8 due to this opportunity to present precertification mitigation  
 9 evidence fails.

10 The government is not required to turn over Brady or  
 11 Giglio materials at this stage of the proceedings. Mr. DeFilippo  
 12 argues in his motion the government is required to  
 13 turn over Brady and Giglio materials to the defense so that  
 14 his lawyers may use such material to prepare their  
 15 pre-certification mitigation letter to the Department of  
 16 Justice. The Court finds, however, that the request for Brady  
 17 and Giglio materials is premature.  
 18 In *United States v. Brady*, the Supreme Court held that  
 19 the prosecution may not suppress evidence favorable to the  
 20 defense as to guilt or punishment. Giglio material, which  
 21 requires disclosure of evidence affecting the credibility of a  
 22 witness who's reliability may be dispositive of guilt or  
 23 innocence falls within the Brady rule.

24 In *U.S. v. Coppa*, the Second Circuit reversed the  
 25 ruling of a judge in this district who granted a defense

1 motion ordering that the government disclose immediately all  
 2 its exculpatory and impeachment material after the indictment  
 3 was returned in a case but before trial date was set. The  
 4 Coppa court held the obligation to turn over Brady and Giglio  
 5 material is not triggered by a defendant's request that maybe  
 6 made at any time after an indictment is returned. The Court  
 7 held that:

8 "As long as a defendant possesses Brady evidence in  
 9 time for its effective use, the government has not deprived  
 10 the defendant of due process of law simply because it did not  
 11 produce the evidence sooner. There is no Brady violation  
 12 unless there is a reasonable probability that earlier  
 13 disclosure of the evidence would have produced a different  
 14 result at trial."

15 As the obligation to turn over Brady and Giglio  
 16 evidence is "independent of a defendant's request", it is the  
 17 government's responsibility to provide any such evidence that  
 18 is material no later than the time at which the outcome of the  
 19 trial would have been different if an earlier disclosure had  
 20 been made. At this time, there is no date set for Mr.  
 21 DeFilippo's trial and it is not at all likely that it will  
 22 occur before 2005. It is true that death is an extremely  
 23 serious penalty, in fact, the most serious penalty. It is of  
 24 utmost importance that a defendant eligible for the death  
 25 penalty have access to exculpatory and impeachment evidence.

1 The government must honor its Brady and Giglio obligations and  
 2 produce this evidence in time for its effective use at trial.  
 3 Given the Second Circuit's Coppa decision, and the fact that  
 4 this decision is not altered by the manual, however, the  
 5 government is not now required to turn over such evidence and  
 6 the Court is not going to exercise its discretion in ordering  
 7 the government to turn over such evidence.

8 With respect to Rule 16 material, Mr. DeFilippo  
 9 asserts that the government has not fulfilled its requirement  
 10 under Rule 16 to turn over the applicable evidence upon its  
 11 request. The government recognizes its obligation under Rule  
 12 16 and must abide by them. If the government, in fact, has  
 13 not complied with its continuing Rule 16 obligation the Court  
 14 orders that it do so forthwith.

15 Is there anything else for today in the 03-929 case?

16 MR. BOURTIN: No, your Honor.

17 THE COURT: Thank you very much.

18 I will excuse the defendants in 03-929, except for

19 Mr. Massino, and we'll continue with a status conference in

20 02-307.

21 Do you have something else?

22 MS. BARRETT: May I approach?

23 THE COURT: Yes, of course.

24 MS. BARRETT: Thank you.

25 THE COURT: Just one minute.